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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bosma Machine and Tool Corporation

File: B-257443.2; B-257443.3

Date: October 17, 1994

Marinus B. Bosma for the protester.
Jonathan H. Kosarin, Esq., and Neil Hirsh, Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly found awardee responsible, and subsequently executed novation agreement with third-party contractor rather than recompete requirement is dismissed: protester does not allege, and record does not show, bad faith or fraud on the part of agency officials in finding the awardee responsible, and the decision to novate contract to another firm rather than recompete is a matter of contract administration not reviewable by General Accounting Office.

DECISION

Bosma Machine and Tool Corporation protests the award of a contract to DeLackner, Inc. under request for proposals (RFP) No. N00104-92-R-CN95, issued by the Department of the Navy for a quantity of aircraft carrier catapult trough covers. Bosma contends that the agency improperly found DeLackner responsible to perform the contract. Bosma also contends that the Navy improperly entered into a novation agreement which transferred the contract to Garvey Precision Machine, Inc. after the award to DeLackner.

We dismiss the protest.[1]

[1]Bosma filed an earlier protest in our Office, on May 27, 1994, contending that the award was improper because Garvey would not perform 51 percent of the work under the contract. We dismissed that protest as untimely on June 10, 1994, (B-257443). Bosma's current protest allegations, distinct from the firm's earlier protest, are timely.

The RFP, issued on August 20, 1992, requested fixed-price offers for 22 aircraft carrier catapult trough covers by October 14, 1992. The Navy received nine initial offers, issued two amendments which changed various terms of the RFP, and received eight new offers, including DeLackner's and the protester's, by the April 15, 1993, revised due date.

The Navy determined that DeLackner was in line for award based on its low price, and thus requested that the Defense Contract Management Area Operations New York (DCMAO) perform a pre-award survey (PAS) on the firm; that survey, dated May 5, recommended "no award" to DeLackner because of a problem with the firm's quality assurance system. Thereafter, DeLackner apparently contacted the agency and represenced that it had remedied this problem. On June 15, the Navy requested that DCMAO reconsider DeLackner's responsibility in light of the firm's representations. On June 21, DCMAO issued a revised PAS that recommended "full award" to DeLackner, finding that the firm's quality assurance system now was acceptable.

The Navy did not proceed with the award at this juncture due to a significant change in its requirements. Rather, on August 31, the agency issued another amendment, which changed the solicitation's packaging requirements. The Navy received seven offers by the September 16 revised closing date. The agency then engaged in discussions with the firms, and requested the submission of best and final offers (BAFO) by February 4, 1994. DeLackner was the apparent successful offeror based on its BAFO. On February 8, the agency's contract specialist attempted unsuccessfully to contact the cognizant PAS monitor to update the agency's information regarding DeLackner's responsibility. The Navy was unable to contact the PAS monitor, and determined that it could nonetheless evaluate DeLackner's responsibility based on the June 21, 1993, PAS; the agency found the firm responsible based on this survey. On February 17, the contracting officer executed an award document making award to DeLackner effective February 20.

Sometime between February 23 and March 10, the protester's president contacted the agency and asserted that DeLackner had been sold to another concern. The agency, in an attempt to verify the assertion, contacted the administrative contracting officer (ACO) on March 10. The ACO verified that DeLackner had sold its assets to another firm, Garvey, on February 19. Shortly thereafter, the Navy was contacted by a representative of Garvey. This individual advised the agency that the firm intended to honor DeLackner's contractual commitment, and proposed that the agency enter into a novation agreement which would transfer the contract to Garvey. Based on these events, and after conducting a

pre-award survey on Garvey, the agency entered into a novation agreement with Garvey and DeLackner, thereby transferring the contract to Garvey.

Bosma makes several arguments concerning the propriety of the award and subsequent novation to Garvey. Bosma first contends that on the February 20 award date, DeLackner did not exist as a corporate entity, and that any award to the firm on that date therefore could not be effective. The record shows, however, that the agency's contracting officer contacted the New York Department of State, Division of Corporations, as late as July 20, 1994, and was advised at that time that DeLackner was recognized as an active corporation in that state. In view of the fact that DeLackner was recognized as an active corporation by the state in which it was incorporated well after the February 20 award date, there is no factual basis for Bosma's contention.

Bosma also argues that the agency improperly found DeLackner responsible based on the June 21 PAS, and maintains that the agency should have verified the firm's ability to perform at the time it was ready to award the contract. According to Bosma, adequate diligence on the part of the agency would have prevented it from making award to a firm which was about to go out of business.

Our Office does not review affirmative responsibility determinations absent a showing that the determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria were misapplied. 4 C.F.R. § 21.3(m)(5) (1994). Bosma has neither alleged nor shown that the agency's actions in finding DeLackner responsible amounted to bad faith or fraud, and there is no contention that the Navy misapplied any definitive responsibility criteria. In this connection, the record contains no evidence--and Bosma does not allege--that the agency's contracting personnel were aware of the impending sale of DeLackner's assets to Garvey at the time of the affirmative responsibility determination, or the time of award. Further, a PAS, current or otherwise, is not a legal prerequisite to an affirmative determination of responsibility, and a contracting official's decision not to conduct a PAS does not establish any impropriety on the agency's part, see Zeiders Enters., Inc., B-251628, Apr. 2, 1993, 93-1 CPD ¶ 291; the agency's decision not to conduct a new PAS therefore does not by itself evidence bad faith.

Finally, Bosma contends that the Navy improperly entered into the novation agreement with Garvey after that firm had acquired the assets of DeLackner. Bosma maintains that the Navy should either have issued a new solicitation or made

award to it as the second-low offeror under the original RFP.

Where a contract has been awarded, we generally will not review a protest that the assignment of the contract to a different firm was improper. The propriety of an agency's decision to enter into a novation agreement transferring a preexisting contract to another concern is a matter of contract administration, and therefore not for consideration by our Office. 4 C.F.R. § 21.3(m)(1); JA & Assocs., Inc.; Son's Quality Food Co., B-256280.2; B-256280.4, Aug. 19, 1994, 94-2 CPD ¶ ___. This case clearly involves a preexisting contract. Approximately 7 months passed between the agency's award to DeLackner and its novation of the contract to Garvey. During that period of time the agency engaged in various actions, including attempting to obtain timely performance from DeLackner, considering whether to terminate DeLackner's contract for default, and conducting a pre-award review of Garvey. Ultimately, the agency decided that it would prefer to novate the contract to Garvey rather than resolicit the requirement. Since there is no evidence that the agency made the award to DeLackner with the intention of entering into a novation agreement transferring the contract to Garvey, the novation relates not to the award of a contract but to contract administration. Id. We therefore decline to consider the allegation.

The protest is dismissed.

Ronald Berger

Ronald Berger
Associate General Counsel